SUPREME COURT, U. S.

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No. 173

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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Your Petitioner, in the reply brief, does not propose to repeat here arguments previously advanced in the Petition. However, the Government, in its brief in opposition to the grant of certiorari, has injected matter into the case, to some of which it is deemed desirable to make a reply.

1. The Respondent argues, we may say gratuitously, that "Petitioner was tried in 1966, and makes no challenge to the decision of the Seventh Circuit to apply the new instruction only prospectively." The ruling of the Seventh Circuit Court of Appeals as it relates to this case was that there was a failure to present any proof of "insanity" and therefore, petitioner was not entitled to a "insanity" instruction (A. 2A). In other words the Seventh Circuit held that it would not apply the ALI instruction in this case for want of sufficient showing by the evidence under any circumstances. The Solicitor errs in his assertion that no challenge was made to the decision of the Seventh Circuit to apply ALI only prospectively after August, 1967. The conflict between the Seventh Circuit in *United States* v. *Shapiro,* 7 Cir., 383 F. 2d 680, and that of the Second Circuit in *United States* v. *Sheller,* 2 Cir., 369 F. 2d 293, was emphatically made in the arguments before that Court in urging that the ALI instruction, as tendered, was appropriate in this cause.

2. The United States suggests under this point that there was no evidence of insanity introduced but only a showing of "idiosyncratic behavior and irresponsibility." Idiosyncratic behavior is, by definition, a mental condition peculiar to a person. (Webster's 20th Century Unabridged, 22d Ed., P. 903). "Derangement" is a disturbance of order. (idem, p. 490). Derangement is insanity (idem, p. 97). This callous indulgence in semantics to defeat an important cause must, we hope, be attributed to an overabundance of work, rather than a disregard for individual liberty.

In this regard it is interesting to note that in a case decided July 30, 1968, in the Second Circuit, Docket No. 31946, slip opinion pg. 3315 (reversed on other grounds),

where the evidence showed, as here, indications of neurotic mental stress, psychoneurotic reaction and depressed behavior, both the prosecution and the trial court showed an awareness of this defense and the necessity of a rebuttal, and an appropriate charge to the jury.

In its opinion, the Court of Appeals stated:

> "During the second trial only two issues were contested: Did the defendant act 'willfully' in failing to file his returns, and was he mentally responsible for his actions? The Government introduced evidence to show Driscoll's ability to handle his affairs—*e.g.*, his successful law practice and major responsibilities, his profitable investments and his active social life—but presented no psychiatric evidence in its case-in-chief. For the defendant, Dr. Lawrence I. Kaplan, a psychiatrist, testified that at the time the tax returns were due Driscoll suffered from a '*character neurosis with* [*a*] *marked difficulty in complying with his responsibilities because of fear of failure.*' The doctor concluded from his examination that:
>
> > In my opinion he did have the type of disorder which would cause him to lack the substantial capacity to conform his behavior to the requirements [of law] and to appreciate the nature of what he was doing.
>
> The defense offered other proof to show appellant's mental deterioration: He procrastinated endlessly when faced with a decision in either business or personal affairs; his desk was a clutter of pending problems and unopened mail; others often had to take over his work to avoid embarrassment to the firm; he was served with seventeen separate dispossess notices for failure to pay rent on the two-room apartment in which he lived alone; his car, accumulating monthly charges of $50, sat unused in a garage from 1963 to 1967.

"In rebuttal, the Government put Dr. Abrahamsen on the stand over a renewal of defendant's pre-trial objections. Relying solely on the two interviews he had conducted under Judge Wyatt's section 4244 order, the doctor testified that while the defendant was 'somewhat depressed and rather uncommunicative,' he was suffering from no more than a 'situational depression.' Such depressions, the doctor explained, are brought on by external events, and they are not mental defects. As a basis for this conclusion, the doctor repeated a number of statements made by the defendant during the interviews. These statements concerned defendant's family, his education, his lack of friends, his eating, sleeping and smoking habits, his prior psychiatric treatment, his rising income and his inability to concentrate on his work." (Emphasis Supplied)

As demonstrated hereafter the Court and prosecution were similarly made aware of the nature of the defense in the case at bar. Thus the 2nd Circuit and the 7th Circuit are in conflict in their treatment of this important defense.[1]

The United States asks this Court wait for "an appropriate vehicle for establishing . . . a uniform insanity instruction." (Ans. p. 2) What is meant by an "appropriate vehicle"? Is one man's liberty more "appropriate" than another? Does not the fact that three cases, the government recognizes, are pounding at this great door

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[1] The instruction tendered and refused in Gorman was given in Driscoll (Dr. Tr. 876, App. 163a).

The law defines insanity for the purpose of responsibility for criminal conduct as follows:

"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

make the question "appropriate" whatever the "vehicle"? *When* is anyone going to find that one man's idiosyncracies duplicate anothers since, by definition, idiosyncracies must be uniqqe?

The Solicitor General cites two cases to this court. One, a bench trial (*Ramer* v. *United States,* No. 97 Misc.) where the court concluded that "under any standard" petitioner was not insane (memo U.S., p. 6) and another (*Church* v. *United States,* No. 141 Misc.), where an instruction we would have welcomed was given, no objection was interposed, and no defense instruction on mental instability was proffered.

Though expansive answers on the above cases was made, a mere reference to those "Answers" is urged to control this appeal to this Court herein. We submit we are unfairly treated so that this Court, in its overabundance of work, will ignore the unilateral evidence by the defense of mental instability, the plea for ALI, and an arbitrary determination that what the trial court recognized was "some considerable evidence relating to the defendant's . . . mental condition" was, in the Court of Appeals, "a failure to reveal any such proof [of insanity]."

3. The Solicitor General interposes under this point some theory of waiver of the ALI standard of want of substantial capacity to appreciate wrongfulness of conduct or want of such capacity to conform his conduct to the requirements of law. Waiver, the Solicitor deduces from a statement by defense counsel on trial, quoted in his answer as "We are only going to a state of mind," in connection with an objection made during the course of trial. The purposeful plucking of one sentence from context to defeat a legal defense should not, and we are

sure will not, be tolerated by this Court. The testimony relative to the petitioner's knowledge of the difference between right and wrong was carefully detailed in the arguments below. They are as follows:

> "Q. During the years 1959 through 1963, Mr. Gorman, did you know right from wrong?
> "A. *In many respects I don't believe that I did.*
> "Q. Did you know that it was wrong to kill?
> "Miss Lavin: Object, your Honor. We have no such contention, we have not made any such contention here.
> "We are getting into the McNaughton case.
> "The Court: Objection sustained.
> "By Mr. Schultz:
> "Q. Were you able to choose between right and wrong when you knew right and wrong?
> "Miss Lavin: Objection, Your Honor. Same objection.
> "We are not making any plea here with respect to the McNaughton case. *We are only going to his state of mind.* (Solicitor's Ploy)
> "The Court: Objection sustained." (Tr. 584)

The psychiatrist testified as follows:

> "Q. The defendant certainly knew right from wrong, did he not?
> "A. Yes." (Tr. 898) (Emphasis & Parenthetical Material Supplied)

We did not suggest that Petitioner did not know moral right from wrong. We certainly do not suggest he was irresistably impelled not to do something. McNaghten was not a defense, and recognized and articulated. But if the defense of insanity was not clear, why a question of whether the petitioner would know whether it was wrong to "kill"?

If it is, as we are sure it is, the intention of the Solicitor General to propose that there was an abandonment of the ALI standard, or that the statement of counsel so influenced the prosecutor that he neglected to overcome the evidence showing mental instability, we submit the argument is a specious one. The Court and the prosecution were constantly advised of the nature of the defense.

Opening Statement:

His health deteriorated, his personal appearance deteriorated. He so allowed his health to deteriorate that he is now affected with a permanent limp. He neglected the most basic elements of just self-preservation, neglect.

The evidence will show that he eventually had to seek help, seek help with his health; his family got him to seek psychiatric help; sent him to a sanitarium, all for what? In December, 1962, he was acquitted of the charge. But experiences like that just don't go away overnight. In 1964, as late as that, the evidence will show, that he suffered a near stroke.

This, then, ladies and gentlemen, is what the evidence will show happens to a man, a sensitive man, who is prosecuted wrongfully. (App. 13)

Course of trial:

> "Mr. Calihan: The theory of the defense, irrespective of the unfortunate aspect of somebody, who knew Judge Perry, being on this jury, this was an anticipated defense: That not only would Mr. Gorman testify to the concern with which he had, but there were other people who felt the same way, that there was no reason—
>
> "The Court: Just keep your voice down, please.
>
> "Mr. Calihan: I am sorry, sir.

"(Continuing) That there was no reason for the bringing of this prosecution.

"It so affected this man that it brought about a complete deterioration of him." (App. 64)

• • •

"Miss Lavin: My theory is that this is corroborative of the outraged state of mind that produced this mental instability of the defendant that was the basic cause of this delinquency." (App. 107)

This statement nearly three hundred pages of transcript after the alleged "waiver", was preceded by counsel's query of the Court "Your Honor, you do understand my theory", and the Court's reply "I understand what your theory is." (App. 107) Despite this colloquy and the evidence presented, the trial court persisted in its refusal to give any instruction on mental instability, and the Court of Appeals concurred. Thus it becomes apparent that a theory of defense was recognized, and there was a refusal to charge on it.

The prosecution could not have been so misled as to have been prejudiced in the presentation of a proper assumption of its obligation to prove sanity beyond reasonable doubt. The fact is that mental instability as a jury question constituting a legitimate defense has not been, and should be, defined by this Court for guidance of litigants. The further fact is that there is no way within the bounds of the federal rules that notice of such a defense is provided for—there is no plea of "not guilty by reason of mental instability."

If, on the other hand, it is determined that the phrasing of the objection was so misleading, then, considering the preparation of the defense, the meticulous presentation of that defense by lay as well as expert testimony, this petitioner was afforded representation that was, at least

inept, and at most a waiver of the only defense he had. If his counsel is deemed to have waived his defense, on that account alone we submit that a new trial should be directed, with counsel sufficiently competent not to waive a defense to which the Constitution entitles an accused.

IV.

The Government's argument under this point will be italicized and the Petitioner's response will be made thereafter. The Respondent states:

> *"Venue was laid under Section 6091(b) of the Internal Revenue Code of 1954 (Pet. App. 7) if his returns had to be filed with the District Director of the Internal Revenue District in Chicago".*

The Petitioner has no quarrel with this statement. The question is whether or not there has been a properly constituted Internal Revenue District in Chicago.

Respondent then states:

> *"Petitioner's argument (Pet. 34-35) is that the President has not acted on his authority (26 U.S.C. 7621 (b)) to create Internal Revenue Districts with the result that the Petitioner could not be prosecuted anywhere for the offenses here involved."*

The Respondent thus recognizes the point made by the Petitioner.

Next the Respondent says:

> *"By reorganization plan No. 1 of 1952 (17 Fed. Reg. Part Two, p. 2243) the President authorized the Secretary of the Treasury to establish new District Offices."*

It is the Petitioner's submission that the Plan refers to offices in the sense that new positions were created

as personnel changes. The pertinent provision of that plan reads as follows:

ABOLITION OF OFFICES OF COLLECTORS AND DEPUTY COLLECTORS OF ILLINOIS COLLECTION DISTRICTS; ESTABLISHMENT OF OFFICES OF DISTRICT COMMISSIONER AND DIRECTORS OF INTERNAL REVENUE

By virtue of the authority vested in me as Secretary of the Treasury by Reorganization Plan No. 26 of 1950 and Reorganization Plan No. 1 of 1952:

1. *Abolition of existing offices.* The abolition of the offices of Collector of Internal Revenue and Deputy Collector for the First and Eighth Collection Districts of Illinois shall become effective as of 12 o'clock midnight, May 19, 1952.

2. *Establishment of District Commissioner.* Effective as of 12:01 a.m., May 20, 1952, there is hereby established within the State of Illinois, and for such State, an office of District Commissioner of Internal Revenue.

3. *Name and composition of District.* The District hereby created shall be known as the Chicago District and shall be comprised of the entire State of Illinois.

4. *Location of headquarters.* The headquarters office shall be located in the City of Chicago, Illinois.

5. *Establishment of offices of Director of Internal Revenue.* Effective as of 12:01 a.m., May 20, 1952, there are hereby created the following offices within the Chicago District:

(a) Director of Internal Revenue for the First Collection District of Illinois (*as presently constituted*). Such

office shall have the operating title of Director of Internal Revenue, Chicago.

(b) Director of Internal Revenue for the Eighth Collection District of Illinois (*as presently constituted*). Such office shall have the operating title of Director of Internal Revenue, Springfield.

Dated: May 15, 1952.

[SEAL]

JOHN W. SNYDER,
Secretary of the Treasury.

[F. R. Doc. 52-5570; Filed, May 19, 1952; 8:55 a.m.]
18 F.R. 3499: (Emphasis added)

This Court will note that 5A and 5B use an expression in parentheses "as presently constituted". The thrust of the reorganization plan is one dealing with personnel and the reference so far as districts are concerned relates to districts *lawfully* designated and there were no lawfully designated districts "presently constituted".

The Respondent, in his next sentence, says:

> *"Under that authority, the Secretary, on May 15, 1952, fixed the place for the filing of Petitioner's returns at Chicago."*

The Petitioner contends that this is not a correct statement. The Secretary, in addition to abolishing certain existing offices (personnel), divided the *office* of the Chicago District into the First Collection District of Illinois (*as presently constituted*) and the Eighth Collection District of Illinois (*as presently constituted*).

It is the Petitioner's contention that the words "as presently constituted" relate back to an action by the

Secretary of the Treasury in 1946. This was the action referred to in the footnote of the Respondent's Brief. Footnote 4 reads as follows:

> *"'An office of the Director of Internal Revenue (the name was later changed to the office of the District Director—Treasury Department Order 150-26, 18 Fed. Reg. Part 3, p. 3499) was established at Chicago, Illinois, for the area of northern Illinois, including Cook County. Treasury Department Order No. 150-3, 17 Fed. Reg., Part 3, p. 4590; cf. Bureau of Internal Revenue—Organization, 11 Fed. Reg. Part 9, pp. 177A-22, 28."*

The date of 11 Fed. Reg. Part 9, is omitted but it occurred in 1946. The action taken under 11 Fed. Reg. Part 9, pp. 177A-22, 28 refers to the action in 1946 of the Secretary of the Treasury dividing Illinois into two collection districts, one of which encompassed Cook County (The County in which Chicago and Oak Park, Illinois are situated). This is the unauthorized designation of the district which is the thrust of the Petitioner's contention. The delegation by the President to the Secretary of the Treasury in 1952 cannot cure this unauthorized act in 1946. There were no "districts presently constituted", because there was no earlier authority to constitute or formulate districts.

The next and last sentence of the Respondent's reply reads as follows:

> *"Since Section 7851(b)(2)(A) of the Internal Revenue Code of 1954 provides that repeal of the 1939 Code 'shall not abolish, terminate, or otherwise change — (A) any Internal Revenue District', it is immaterial that the President has not subsequently acted on his authority to establish Internal Revenue Districts."*

This statement does not in any way meet the point. True, the Internal Revenue Code of 1954 in repealing the 1939 Code did not act to abolish, terminate, or otherwise change any Internal Revenue District. However, it is the Petitioner's respectful contention that no district had ever been lawfully established. The only action which in any way related to the establishment of the district took place in 1946, a time prior to the authorization given by the President to the Secretary of the Treasury in the reorganization plan of 1952. The Act of 1954, in not abolishing or terminating any Internal Revenue District, referred to districts "as presently constituted." It is Petitioner's contention that "as presently constituted" means lawful constitution. The whole thrust of the argument is that the designation of Cook County as a part of the collection district in Illinois in the year 1946 was without any authority under law. A subsequent delegation of that authority in 1952 cannot cure the unlawful designation made in 1946.

The Internal Revenue Code of 1954 did not create any districts; it merely stated that it would not abolish, terminate or otherwise change any Internal Revenue District. If the Internal Revenue District in Illinois had not been lawfully created, it was not a district reached by the Revenue Code of 1954.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner.